



IN THE
SUPREME COURT OF THE UNITED STATES

NO **76-1752**

JUDY BERRY and DONALD A. BERRY,

Petitioners

v.

HINDS COUNTY, MISSISSIPPI,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

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The petitioners, Judy Berry and Donald A. Berry, respectfully pray that a writ of certiorari issue to review the order and opinion of the Supreme Court of the State of Mississippi entered in this proceeding on March 30, 1977.

OPINIONS BELOW

The judgment of the Circuit Court of the First Judicial District of Hinds County, Mississippi (Appendix C, infra, pp. 32,33) is not officially reported. The opinion of the Supreme Court of the State of Mississippi (Appendix A, infra, pp.18-29) is not yet officially reported.

JURISDICTION

The order of the Supreme Court of the State of Mississippi (Appendix B, infra, p. 30) affirming the lower court judgment, was entered on March 30, 1977. The jurisdiction of this Court is conferred by 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the governmental immunity accorded Hinds County, Mississippi by the Supreme Court of the State of Mississippi, thereby denying to petitioners damages for personal injuries and property damage sustained due to the negligence of the respondent's agent in allowing a bridge to deteriorate and collapse, is violative of the "due process of law" provisions of the Fifth and Fourteenth Amendments of the United States Constitution, and the "equal protection" provisions of the Fourteenth Amendment.

STATUTORY PROVISIONS INVOLVED

The applicable provisions of the Fifth and Fourteenth Amendments of the United States Constitution are set forth in Appendix D, infra, page

STATEMENT OF CASE

Petitioners Berry instituted suit in the Circuit Court of the First Judicial District of Hinds County, Mississippi against Hinds County, Mississippi, alleging that the petitioners had received personal injuries and property damage when the car in which they were riding in November of 1970 fell from a collapsed bridge on a county road in Hinds County, Mississippi. Petitioners further alleged that the deterioration and collapse of the bridge was proximately caused through the negligence of Mr. Malcolm N. Warren, the Supervisor of the particular "beat" in which the bridge was located. Prior to this effort to impose liability upon Hinds County, Mississippi, suit had been brought by petitioners against Mr. Warren, individually, and his bonding company for his negligence. The circuit court sustained a demurrer in that proceeding, and an appeal was taken to the Supreme Court of the State of Mississippi. On appeal in that matter, the Supreme Court of the State of Mississippi held in Berry v. Warren, et al., 304 So.2d 284 (1974), that the duty of inspection and repair of the bridge in question was the duty of the entire Board of Supervisors, and not of Mr. Warren individually. The lower court judgment sustaining the demurrer was affirmed, and this action commenced.

Hinds County, Mississippi, filed a General Demurrer in the trial court alleging that in the absence of statute, Hinds County, Mississippi, was immune from suit, based on the tortious activities of its officers or employees. That demurrer was sustained by the circuit judge on the theory of governmental immunity, the declaration filed therein was dismissed, and petitioners then took an appeal to the Supreme Court of the State of Mississippi.

At the time of the happening of the wreck in which petitioners were injured, there was in effect in the State of Mississippi a statute (§65-7-117, Mississippi Code of 1972; §8344 Mississippi Code of 1942), requiring each member of the Board of Supervisors to inspect every bridge in his district at least every three months in each year, and to file with the Clerk of the Board of Supervisors a report of the conditions of those bridges inspected by him, with such recommendations as were needed. It was further required that once a year the entire board make a complete inspection of all public bridges in the county. As was alleged in the suit filed in the circuit court, the failure of the individual supervisor as agent of Hinds County, Mississippi, properly to inspect and make needed recommendations as to the repair of the bridge in question proximately resulted in the injuries and property damage to the petitioners.

Although petitioners alleged in their Declaration that to deny relief to them in this proceeding in view of the prior decision of the Supreme Court of the State of Mississippi in Berry v. Warren, supra, would be in deprivation of their rights under the United States

Constitution, as it would deprive them of their property without due process of law, the circuit court nevertheless sustained the demurrer.

The Supreme Court of the State of Mississippi, in its opinion (Appendix A, infra, p. 18), without touching on the Constitutional issue, held that the doctrine of governmental immunity applied, and that the judgment of the Circuit Court of the First Judicial District of Hinds County, Mississippi, sustaining the demurrer would be affirmed.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW HOLDING HINDS COUNTY, MISSISSIPPI, IMMUNE FROM SUIT IS VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The Fourteenth Amendment to the Constitution of the United States provides in part:

"... nor shall any state ... deny to any person within its jurisdiction the equal protection of the laws."

The Fourteenth Amendment, therefore, forbids the States to discriminate unconstitutionally against any person or class of person within the states' respective jurisdiction. The doctrine of sovereign or governmental immunity as it now exists in the State of Mississippi creates three classes of individuals in the State of Mississippi, who have suffered injury to their person or property.

The first is that class of individuals injured by some wrongful act or omission of the state or county. Those individuals cannot acquire jurisdiction over the state or county unless there is available some statute expressly, or by necessary implication, authorizing such an action. Ayres v. Board of Trustees of Leake County Agricultural High School, 134 Miss. 363, 98 So. 847 (1924); Simpson County v. Kelly, 166 So. 532, 175 Miss. 596 (1936). Absent such consent to suit by statute, those injured individuals are precluded from litigating their claims in the branch of government uniquely suited by training and experience impartially to hear and to resolve disputes arising from injury to person or property.

The second is that class of individuals injured by some wrongful act or omission of a municipality based on negligence in the exercise of a "private or proprietary" function as opposed to the exercise of a function which is "essentially governmental in character". Bishop v. City of Meridian, 223 Miss. 703, 79 So.2d, 221 (1955) Suggestion of error overruled, 223 Miss. 703, 79 So.2d, 815; Tucker v. City of Okolona, 227 So.2d 475 (1969).

The third is that class of individuals injured by some wrongful act or omission of a private person. Those individuals have full and free access to the courts for the litigation of their claims.

Under the foregoing classifications, persons injured by a governmental entity are classified, solely, by the type of governmental entity involved. Their right to redress and the remedies available, to them, is dependent solely upon this classification. Does a person's right to redress by due course of law become less worthy of protection because he or she was injured by a particular governmental unit? Does such person's right to compensation become any the less worthy

because of the type of governmental unit involved?

Under the present Mississippi law, no regard is given to the injury, or the facts and circumstances surrounding the events which caused the injury--it is the type of governmental agency and the activity in which it is engaged that determines whether the aggrieved party will find the doors of the court open or closed. Such a classification is forced and unreal, and greater burdens are imposed on some than others, thereby making those classifications arbitrary, discriminatory, and unreasonable.

It appears that the courts of this country have been infrequently confronted with the argument that the doctrine of sovereign immunity violates the Equal Protection Clause of the Fourteenth Amendment.

However, in 1971, the Court of Appeals of Ohio directly faced the issue and held that sovereign immunity violated the Equal Protection Clause. Krause v. State, 28 Ohio App. 2d 1, 274 N.E. 2d 321 (1971). In addressing itself to the issue of sovereign immunity, the court posed the following question:

"Is the withholding of a remedy based on reasonable or on arbitrary grounds when it is withheld from persons injured by state torts but not private ones, or from some persons but not others injured by government in tortious, but different phases of its activity? Do such distinctions reflect a rational policy or simply capricious action?" (At p. 327).

The court concluded that the only possible basis for sovereign immunity is the threat of numerous suits against the state, but then indicated that such is not a rational basis for denying equal protection, stating:

"If the threat of multiple suits is not a tenable basis for the distinctions created by the immunity, and we hold it is not, then there is none. The distinctions then depend on a gossamer as frail as that supporting those distinctions founded on nationality or race. A distinction so based is capricious and represents no policy but an arbitrary attempt to lift state responsibility without reason. In such circumstances, the permissible line between reasonable classification or a rational policy, and a denial of equal protection is crossed. This fatally offends the Constitution." (At p. 327).

Unfortunately, the Ohio Supreme Court subsequently reversed the decision of the Ohio Court of Appeals. Krause v. State, 31 Ohio St.2d 132, 285 N.E.2d 736 (1972). In that case Justice Brown dissented and wrote an opinion which ably analyzes the equal protection argument as it applies to sovereign immunity. He began his dissent by asserting that the Ohio law which prohibits suit against the state without the state's consent:

"...unconstitutionally discriminates against the victims of state acts of negligence, in violation of the equal protection provision of the United States Constitution. It infringes upon one of the most fundamental progenitors of due process of law through which all other legal rights may be enforced-- access to the courts unhindered by the need for the expressed consent of the party-defendant." (At p.746)

In recognizing the fundamental nature of the right with which this appeal is concerned, Justice Brown stated:

"The ability to seek redress in the courts is a fundamental right guaranteed by the due process provision of the Fourteenth Amendment to the United States Constitution, and restrictions on such a right require 'close scrutiny' by the judiciary. (Citations omitted). A state classification denying this right to the victims of state negligence, in absence of that state's express consent, draws a line that is repugnant to our traditional democratic concept of governmental responsibility to the public." (At p. 747).

He offered further analysis of the equal protection argument, reasoning:

"...where the state commits intrinsically the same negligent act as would justify recovery if committed by a private entity and the law lays an unequal hand on those who have 'been the unfortunate victims of the state...it has made an as invidious discrimination as if it had selected a particular race or nationality for oppressive treatment'." (At p. 747)

The majority of the Supreme Court in Krause appears to have based its reversal, in part, on the notion that the rule of sovereign immunity is not a denial of equal protection because it does not classify persons; it denies the right to sue the state to all individuals. In meeting that argument, Justice Brown pointed out:

"However, as recognized in Brown v. Board of Education, 347 U.S. 483, 74 Sup.Ct. 686, 98 L.E. 873 (1954), 'separate but equal' does not comport with equal protection of the laws where a fundamental right is involved." (At p.748).

The majority of the Supreme Court in Krause also suggested that no discrimination

problem arises when things are different in fact, i.e., there is no Constitutional requirement that things different in fact be treated as though they were the same. Justice Brown, agreeing with this premise, then applied the reasoning underlying the premised sovereign immunity issue:

"...I believe that in order to determine whether such difference does exist, we must focus upon the underlying substantive conduct involved, and not the status of the party-defendant, when a denial of due process is involved. If two people are walking down the street together, and one is negligently run down by a privately owned and operated truck, while the second is run down by a state owned and operated truck, the law--in common decency--can ill afford to say that those identical accidents are 'things which are different in fact'."

* * *

"The victim of the state truck is both substantively and literally in no different a position than the victim of the private truck. Yet one, but not the other, is denied his day in court..." (At p. 749).

While it is true that all victims of the wrongful acts or omissions of the State of Mississippi, or a county thereof, are denied access to an adequate remedy, sovereign immunity does in fact create and perpetuate two classes of injured individuals. There is no rational basis for making such a class distinction, and the rule of sovereign immunity destroys the fundamental right of access to an adequate remedy for injuries wrongfully inflicted.

The Supreme Court of the State of Kansas likewise dealt with the issue of the unconstitutionality of governmental immunity in the case of Brown v. Wichita State University, et al., 217 Kan. 279, 538 P.2d 713 (1975). The lawsuit precipitating the appeal in which this opinion was rendered arose from the crash of a chartered aircraft carrying members of the 1970 Wichita State University football team, members of the faculty and university supporters. The plaintiffs were either surviving passengers or the personal representatives of those killed in the crash. Wichita State University was one of the defendants, and under Kansas law, as a state educational institution, the university had become an agency of the State of Kansas, controlled and operated under the supervision of the Board of Regents. After the three lawsuits were consolidated, the district court ruled that the governmental immunity statutes of the State of Kansas were constitutional and rendered summary judgment in favor of Wichita State University. The plaintiffs in their appeal made a direct attack on the statutory constitutionality of the enacted doctrine of governmental immunity in the State of Kansas as denying them equal protection of the law under the Fourteenth Amendment to the United States Constitution, and as denying them due process of the law under the Fourteenth Amendment. The Supreme Court of Kansas found that the doctrine of governmental immunity as contained in the Kansas statutes was constitutionally impermissible and violative of the Fourteenth Amendment. In so finding, that court stated:

"The doctrine of governmental immunity is an historical anachronism which manifests an inefficient public policy and works injustice upon everyone concerned. The doctrine and the exceptions thereto, operate in such an illogical manner as

to result in serious inequality. Liability is the rule for negligent or tortious conduct, immunity is the exception. But when the tortfeasor is a governmental agency, immunized from liability, the injured person must forego his right to redress unless within a specific exception. Equality is not achieved by artificial exceptions which indiscriminately grant some injured persons recourse in the courts and arbitrarily deny such relief to others. (Citation omitted.) The operative effects of such arbitrary distinctions are incompatible with the constitutional safeguards established by both the federal and Kansas Constitutions."

Although, upon rehearing, the Kansas Supreme Court reconsidered its position (547 P2d 1015) and held that since the legislature had made the prior common law immunity statutory, it was not the judiciary's place to obviate the legislature's will, the initial decision thoroughly and properly analyzes the common law concept of immunity from a Constitutional standpoint.

For these reasons, the doctrine of sovereign immunity violates the Equal Protection Clause of the Fourteenth Amendment, and should be abrogated by this Court on the grounds that it is unconstitutional.

II

THE DECISION BELOW HOLDING HINDS COUNTY, MISSISSIPPI, IMMUNE FROM SUIT IS VIOLATIVE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AS DENYING DUE PROCESS

In addition to being violative of the "Equal Protection" clause of the Fourteenth Amendment, the doctrine of governmental

immunity as applied in this case deprives the petitioners of their property without due process of law, likewise in violation of the Fourteenth Amendment and the Fifth Amendment to the Constitution.

The doctrine of sovereign immunity, as applied in the State of Mississippi, prevents access to the courts for litigation of certain claims against the state, and through that immunity, against the county. Denial of access to the courts, coupled with the absence of a comparable substitute forum and procedure for determining claims, amounts to a denial of due process of law for victims of injuries wrongfully inflicted by an agent of the county in the State of Mississippi.

The question of access to the courts has not often been considered within the context of due process. Yet it seems that one of the essential requirements of due process of law ought to be access, for victims of wrongfully inflicted injuries, to an impartial tribunal suited by training and experience to hear claims of injuries to person and property, to sift competent from incompetent evidence, to determine the applicable rules of law, and to apply the appropriate rules of law to the cases brought before it. The few courts which have considered the issue of access all seem to agree that it is essential to our legal system to provide for an orderly, fair and effective means of resolving disputes among people; that persons involved in disputes are entitled to a meaningful opportunity to be heard; that the procedure employed for resolving disputes must be appropriate to the nature of the case; and that, if the judiciary itself is not employed to resolve disputes, then a reasonable substitute ought to be made available.

The United States Supreme Court, in Boddie v. Connecticut, 401 U.S. 371, 91 Sup.Ct. 780, 28 L.E.2d 113 (1971) dealt squarely with the issue of access to the courts as a due process requirement.

In Boddie, an indigent, desiring to obtain a divorce, challenged a state statute which required payment of court filing and process fees as a condition precedent to gaining access to the divorce court. The Supreme Court held the statute to be violative of due process of law because it denied to indigents access to the only remedy available to obtain the kind of relief desired.

Justice Harlan, writing for the majority, observed that organized society needs a legal system characterized by stability and predictability. He acknowledged that the courts provide such a system by stating:

"American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for disputes settlement, not on custom or the will of strategically placed individuals, but on the common law model. It is to courts, or to other quasi-judicial bodies that we ultimately look for the implementation of a regularized, orderly process of dispute settlement." (At p. 375).

Although Justice Harlan limited the application of that decision to the issue of an indigent seeking a divorce, Justice Brennan, in his concurring opinion, argued:

"I see no Constitutional distinction between appellant's attempt to enforce this state statutory right and an attempt to vindicate any other right arising under federal or state law.

"The right to be heard in some way at some time extends to all proceedings entertained by courts. The possible distinctions suggested by the Court today will not withstand analysis." (At pp. 387,388).

The courts have provided the common law model for what Americans have come to rely on as "due process". All the attributes of judicial proceedings--the rights to notice, the opportunity to be heard, to cross-examine, to findings based on competent evidence--are attributes of due process. Americans have come to expect their "day in court" when they have disputes, and that "day in court" means that due process of law in all its aspects will be available and will be meaningfully applied.

The Kansas Supreme Court in the Brown case, supra, spoke also to the "due process of law" issue raised by the plaintiffs in that case, and reasoned:

"To say the governmental immunity statutes in question subvert the concept of due process, is but to state the obvious, for that doctrine blocks access to our courts to those seeking redress for injuries occasioned by the negligent acts of a governmental entity. In the instant case, the appellants have been summarily excluded from our courts--the only forum empowered by the people to redress their grievances by due process of law..."

* * *

"But if due process is to be secured, the law must operate alike upon all, and not subject the few to the arbitrary exercise of governmental power. Every

citizen of this state has a right to be protected by the government in the enjoyment of his life, liberty, and property. To that end elaborate safeguards are to be found in the law. The life and liberty the state may not take directly, it may not take indirectly for a 'grant of power by the public is never to be interpreted as a privilege to injure'." (Citation omitted.)

It is curious to note that when the State of Mississippi, through its power of eminent domain takes real property for public use, the property owner has a right to have the court determine the fairness of the award, but that there is no corresponding right when the state or county wrongfully inflicts injury to person or property. Sections 11-27-1, et seq., Mississippi Code of 1972. There seems to be no legal or logical reason to deny the same right to a victim of personal injury wrongfully inflicted by the state or one of its subdivisions.

The decision in the Supreme Court of the State of Mississippi, involving the deprivation of Constitutional rights secured to these petitioners, justifies the grant of certiorari to review the judgment below.

CONCLUSION

When the State of Mississippi, or one of its subdivisions, the county government, can, through the acts of its agents and in violation of its express responsibilities to its citizens, inflict damage to person and property without being required to render compensation to the injured, the Equal Protection Clause of the Fourteenth Amendment, and the Due Process Clauses of the Fifth and Fourteenth Amendments become meaningless. The Supreme

Court of the State of Mississippi in this case has decided an important question of Constitutional law which has not been, in light of present-day circumstances, but should be, expressly settled by this Court. Although this case involves only two individuals and their damages, the Constitutional question presented by this case is important to every citizen of the United States of America who may one day stand in the shoes of these petitioners. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Mississippi.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

NO. 49,135

JUDY BERRY AND DONALD A. BERRY

V.

HINDS COUNTY, MISSISSIPPI

BEFORE PATTERSON, ROBERTSON AND BROOM

ROBERTSON, JUSTICE, FOR THE COURT:

This suit involves the doctrine of governmental immunity of a county from suit.

Suit was brought by Judy and Donald A. Berry against Hinds County, Mississippi, in the Circuit Court of the First Judicial District of Hinds County, to recover damages for personal injuries suffered by them when their automobile crashed into a collapsed bridge which spanned a large ditch on Longino Road in Hinds County. The accident happened about 6:30 p.m. on November 22, 1970, as the plaintiffs with their children were riding in the family automobile.

A general demurrer was sustained to the declaration, and the plaintiffs declining to plead further, the judgment was made final and the declaration dismissed.

On appeal, the Berrys contend that the doctrine of governmental immunity should be abolished - that there is no valid reason for continuing this outmoded and antiquated doctrine. The appellants further contend that this doctrine of sovereign or governmental immunity was created by the courts and therefore should be abolished by them.

Appellants cite Ayala v. Philadelphia Board of Public Education, 305 A.2d 877 (Pa. 1973), as their most persuasive authority. In a very lengthy opinion, by a four-to-three vote, the Supreme Court of Pennsylvania reached this conclusion:

"We now hold that the doctrine of governmental immunity--long since devoid of any valid justification--is abolished in this Commonwealth." 305 A.2d at 878.

This broad and all-encompassing ruling was made in spite of the fact that the suit was only brought against the Philadelphia Board of Public Education for injuries suffered by William Ayala, Jr. when his arm was caught in a shredding machine in the upholstery class of the Carrol School in the City of Philadelphia.

The appendix to the opinion in Ayala lists eighteen states (including the District of Columbia) which have judicially abrogated the doctrine of governmental immunity. Pennsylvania, of course, should be added to the list, and, also, Alabama, which abrogated the doctrine as to counties (by a five-to-four vote) in Lorence v. Hospital Board of Morgan County, 320 So.2d 631 (Ala., 1975). This makes a total of twenty states. Seven states are listed as having statutorily abrogated the doctrine.

One hundred years ago in the landmark case of Brabham v. The Board of Supervisors of Hinds County, 54 Miss. 363 (1877), this Court stated its views on the doctrine of governmental immunity:

"The plaintiff in error sued the defendant in error to recover damages for the death of her husband, produced by the falling of a county bridge while he was crossing it with his wagon and team.

"If a county can be held liable for damages suffered in consequence of neglect to repair a county bridge in any case, it should be held so in this. At common law, a county could not be so held liable. No statute makes it liable. The 'demands', 'accounts' and 'claims' contemplated in the statutes to be audited and allowed by boards of supervisors, and authorized to be sued on, if allowance is refused by the board, are manifestly such liabilities of the county as are provided for by some statute. A county can have no liability except as authorized, expressly or by necessary implication, by some statute. Counties are political divisions of the State, created for convenience. They are not corporations with the right to sue and be sued as an incident to their being, but are quasi corporations, invested by statute with certain powers, and subject to certain liabilities, and can neither sue nor be sued, except as authorized by statute. The right to maintain a suit like this against a county is not only outside of the contemplation of the statutes, but is opposed by every consideration of sound policy." 54 Miss. at 364.

Over the years since Brabham, Mississippi has steadfastly adhered to this fundamental doctrine. Owens v. Jackson Municipal Separate School District, 264 So.2d 892 (Miss. 1972); Lowndes County, District 5 v. Mississippi State Highway Commission, 220 So.2d 349 (Miss. 1969); Board of Education of Forrest County v. Sigler, 208 So.2d 890 (Miss. 1968); Board of Supervisors of Lee County v. Payne, 175 Miss. 12, 166 So.332 (1936); Simpson County v. Kelly, 175 Miss. 596, 166 So.532 (1936); Federal Land Bank v. Leflore County, Mississippi, 170 Miss. 1, 153 So.882 (1934); McNulty v. Vickery, 126 Miss. 341, 88 So.718 (1921); City of Grenada v. Grenada County, 115 Miss. 831, 76 So.682 (1917).

In Monaco v. State of Mississippi, 292 U.S. 313, 78 L.Ed., 1282 (1933), the Supreme Court of the United States said:

"The 'entire judicial power granted by the Constitution' does not embrace authority to entertain such suits in the absence of the State's consent. (Citations omitted).

"Protected by the same fundamental principle, the States, in the absence of consent, are immune from suits brought against them by their own citizens or by federal corporations, although such suits are not within the explicit prohibitions of the Eleventh Amendment." 292 U.S. at 329-30, 78 L.Ed. at 1289.

In Board of Supervisors of Lee County v. Payne, 175 Miss. 12, 166 So.332 (1936), this Court pointed out that counties and municipalities of the state are not on the same plane and that there are some fundamental differences between them. In Payne, we said:

"It is argued that counties and municipalities are upon the same plane, and should be held alike liable for a breach of a contract. The courts have universally made a distinction between counties and other municipal corporations, such as cities, towns, and villages. 'The principal ground upon which counties are not held liable for damages in actions for their neglect of public duty is that they are involuntary political divisions of the state, created for governmental purposes, and are organized without regard to the consent or dissent of the inhabitants. The theory upon which municipal corporations proper are held liable in such cases is that they are voluntary associations created and organized at the solicitation of, and with the free consent of, the inhabitants, under the laws of the state, and that the benefits accruing to the people by such incorporation compensate them for the liability. Another reason is that since the county is but a political subdivision of the state, a suit against the county is, in effect, a suit against the state, and that therefore an action will not lie without the consent of the legislature." 175 Miss. at 23, 166 So. at 335 (Emphasis added).

While it might be true that this doctrine was first enunciated by the English courts, still it came to this country as a part of the Common Law and early in the history of the United States was adopted as a sound and reasonable concept of the law.

The Legislature long ago began the process of chipping away at this doctrine of governmental immunity in appropriate areas. In 1914, the Legislature passed an act which provided:

"The board of supervisors of any county shall have the power, in their discretion, to allow damages sustained to stock and other property injured or destroyed while traveling along the public highways maintained by the county where such loss is caused by defects in a bridge, causeway or culvert in such highway. No such payment shall be allowed unless such defects in such bridge, causeway or culvert was the proximate cause of the injury and not apparent or discoverable by the exercise of reasonable diligence, and no such payment shall be made unless such defect had existed for such a time that the failure to remedy or repair the same amounts to gross carelessness on the part of the county. Such payments shall be made from the county road and bridge funds, or from the road funds of the district where such accident occurred, as the circumstances render proper.

"A claim under section 19-13-51 for accidents occurring shall be made in writing, itemized and sworn to, and shall be filed within three months after such accident occurs, and shall remain on file with the clerk of the board of supervisors for sixty days before the first day

of the term at which it comes up for hearing. Notice of its pendency shall be published in a newspaper published in the county at least one time before such claim comes up for hearing, and if there be no paper in such county, by posting notices at the courthouse and other public places.

"No payment shall be made hereunder except by a four-fifths recorded vote of all the members of the board of supervisors. Where the property injured or destroyed is properly assessable, no evidence of the actual value of the property injured or destroyed shall be received or considered, but the assessed value thereof as shown by the assessment rolls of the county shall be the only evidence of value, and the damages allowed shall be fixed in proportion. Where the property injured or destroyed is not properly assessable and was not assessed, then the board of supervisors shall receive evidence of the actual value of the same, and shall allow damages in proportion. Sections 19-13-51 to 19-13-55 shall not be construed as creating any enforceable liability against any county."

Mississippi Code Annotated, §§ 19-13-51, 19-13-53, and 19-13-55 (1972).

It is apparent from even a cursory reading of these statutes that the legislature felt it necessary to carefully limit and circumscribe the approval of such claims. Even then in order for there to be no misunderstanding, the legislature said:

"Sections 19-13-51 to 19-13-55 shall not be construed as creating any enforceable liability against any county."

In 1972, the legislature provided for suits against counties or school districts operating school busses. Mississippi Code Annotated section 37-41-37 (Supp. 1976), provides in part:

"In the event of any accident resulting in the death of or injury to any person or in damage to property (a) arising out of the negligent operation of any school bus or other vehicle owned by any county or any municipal separate school district or public junior college district or consolidated school district, or operated by such county or municipal separate school district or public junior college district by private contract, for the transportation of pupils to and from the public schools of such county, or municipal separate school district or junior college, or (b) caused by a bus while being operated in pursuance of any activity of any of such schools, or (c) arising by reason of negligence in the maintenance, upkeep, repair or mechanical failure of such vehicle, any person receiving such injuries or sustaining such damages shall have a right of action against the county or municipal separate school district or junior college district or consolidated school district, which operates such vehicle. Such county or municipal separate school district or county or municipal separate school district or junior college district or consolidated

school district, may not plead the defense of governmental immunity in bar to any such action or recovery, and such suit may be tried as any other civil action." (Emphasis added).

Again the Legislature thought it necessary to limit and circumscribe recovery and to provide for funds out of which such claims could be paid. In Section 37-41-39 the Legislature provided for counties and school districts to pay into an "accident contingent fund" to be set up in the state treasury.

In Section 37-41-41 (Supp. 1976), the Legislature placed a limit of \$10,000 on each such claim for one person, and \$50,000 for any one accident. A limitation of \$1,000 per claimant per accident was placed on a claim for property damage, and \$550 on a claim for hospital, medical and doctor bills per person per accident.

In 1973, the Legislature provided for the purchase of liability insurance by counties:

"The board of supervisors of any county in this state is authorized, in its discretion, to obtain and pay for liability insurance covering each, all or any of the motor vehicles of the county so as to cover the following damages for injury to persons or property, or both, caused by the negligence of any duly authorized officer, agent, servant or employee of such county while operating such motor vehicle in the performance of his official duties, said policy to be written by the agent or agents of a company or companies authorized to do and

doing business in the State of Mississippi. Provided, however, that on each vehicle the insurance policy shall be a minimum of ten thousand dollars (\$10,000.00) for personal injury to any one (1) person in any one (1) accident, or a minimum of twenty thousand dollars (\$20,000.00) for personal injury to two (2) or more persons in any one (1) accident, and a minimum of five thousand dollars (\$5,000.00) property damage. All policies shall be subject to the approval of the board of supervisors and the premiums thereon shall be paid from the general fund of such county, road and bridge maintenance funds of such county or districts in such county. The board of supervisors of any county is authorized, in its discretion, to purchase general liability insurance coverage for its members and county employees in the official performance of their elective or appointive duties. Said general liability policy shall be written by the agent or agents of a company or companies authorized to do and doing business in the State of Mississippi. The monetary limits of any such policy shall be set by the board of supervisors in amounts they feel are adequate and reasonable in light of existing circumstances. The premiums on such policies shall be paid from the county general fund or from any other available county funds.

"If liability insurance is in effect in such county, such county may be sued by anyone affected to

the extent of such insurance carried; provided, however, that immunity from suit is only waived to the extent of such liability insurance carried and a judgment creditor shall have recourse only to the proceeds or right to proceeds of such liability insurance."

Miss. Code Ann., §19-7-8 (Supp. 1976). (Emphasis added).

Our Federal courts have not seen fit to abolish the doctrine of governmental immunity by judicial fiat. They exercised the proper judicial self-restraint and waited for Congress to act. In 1946, Congress (representing all the people) enacted the Federal Tort Claims Act (28 U.S.C.A. §§2671-2680). This law has spawned prolific and, at times it seems, unlimited litigation.

Appellants contend that they were authorized to bring suit and did bring suit under the provisions of Mississippi Code Annotated §11-45-17 (1972), which provides:

"Any county may sue and be sued by its name, and suits against the county shall be instituted in any court having jurisdiction of the amount sitting at the county site; . . ."

Long ago, we held, in State Highway Commission v. Gully, 167 Miss. 631, 145 So.351 (1933):

"A general statutory grant of authority to sue a governmental subdivision or agency does not create any liability, and suit may

be maintained thereunder only for such liability as is authorized by statute, expressly or by necessary implication. City of Grenada v. Grenada County, 115 Miss. 831, 76 So.682; Brabham v. Board of Supervisors of Hinds County, 54 Miss. 363, 28 Am.Rep.352. At the time these cases were decided, the statute provided that any county might sue or be sued by its name, section 3484, Rev. Code 1871, section 309, Code 1906; and it was expressly held in each of these cases that there can be no liability against the state or its political subdivisions or agencies unless it is expressly or impliedly created by statute." 167 Miss. at 647, 145 So. at 354. (Emphasis added).

Of course, the courts, as well as the legislature, have the undoubted right to abrogate the doctrine of governmental immunity. We are of the opinion, however, that the legislature is in a better position to limit and restrict claims that can be asserted and to provide the ways and means for the paying of such claims (either by taxation or appropriation), if it should see fit to do so. Therefore, we decline to abolish the doctrine of governmental immunity at this time by judicial decision.

The trial court was correct in sustaining a general demurrer to the declaration. The judgment of the circuit court is, therefore, affirmed.

This case was considered by a conference of the Judges en banc.

AFFIRMED.

ALL JUSTICES CONCUR.

APPENDIX B

STATE OF MISSISSIPPI

To the Honorable the Circuit Court, of
Hinds County--Greetings:

WHEREAS, on the 30th day of March, 1977
(the same being a day of the regular term of
our SUPREME COURT, begun and held in the
Court room, in the Capitol, in the City of
Jackson, in said State, on the 1st Monday of
March, in the year of our Lord, 1977, the
following final Judgement was rendered by our
SUPREME COURT, to-wit:

JUDY BERRY AND DONALD A. BERRY

NO. 49,135 vs.

HINDS COUNTY, MISSISSIPPI

This cause having been submitted at a
former day of this Term on the record herein
from the Circuit Court, First Judicial District
of Hinds County and this Court having sufficiently
examined and considered the same and being of
the opinion that there is no error therein
doth order and adjudge that the judgment of
said Circuit Court rendered in this cause on
the 3rd day of July, 1975-be and the same is
hereby affirmed. It is further ordered and
adjudged that the appellant and Western
Casualty & Surety Company, surety on the
appeal bond herein, do pay all of the costs
of this appeal to be taxed for which let
proper process issue.

YOU ARE THEREFORE HEREBY COMMANDED, That
such execution and further proceedings be had
in said cause, as according to right and
justice, and the judgment of our SUPREME
COURT and the law of the land ought to be
had.

WITNESS, the Hon. Robert G.
Gillespie, Chief Justice of our
Supreme Court; also the signature
of the Clerk and the Seal of
said Court hereunto affixed,
at office, at Jackson, this the
26th day of April, A.D., 1977.

s/Julia H. Kendrick, Clerk

(Circuit Court #22,785)

APPENDIX C

IN THE CIRCUIT COURT OF THE FIRST
JUDICIAL DISTRICT OF HINDS COUNTY,
MISSISSIPPI

JUDY BERRY and
DONALD A. BERRY PLAINTIFFS

V. NO. 22,785

HINDS COUNTY, MISSISSIPPI DEFENDANT

J U D G M E N T

This cause came on for hearing by agreement of counsel for all of the parties hereto on the defendant's general demurrer to the Declaration exhibited against it herein and the Court having considered same on oral arguments of counsel finds:

1. That said general demurrer should be and the same is hereby sustained.

2. That the plaintiffs have declined to plead further herein.

IT IS THEREFORE ORDERED AND ADJUDGED that defendant's general demurrer to the Declaration filed herein be and the same is hereby sustained and that plaintiffs recover nothing of or from the defendant and that the Declaration filed herein be and the same is hereby dismissed with all Court costs incurred herein taxed against the plaintiffs, for which let execution issue.

ORDERED AND ADJUDGED this 3rd day of
July, 1975.

s/Leon F. Hendrick
CIRCUIT JUDGE

APPROVED AS TO FORM ONLY:

s/Robert B. Sessums
Of Counsel for Plaintiffs

s/Thos. H. Watkins
Of Counsel for Defendant

APPENDIX D

THE UNITED STATES CONSTITUTION
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CERTIFICATE OF SERVICE

I hereby certify that on this the 6th day of June, 1977, three copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, to Thomas H. Watkins, Esq., and John N. Putnam, Esq., at their usual business addresses in Jackson, Mississippi, counsel for the respondent. I further certify that all the parties required to be served have been served.

Pat H. Scanlon

Pat H. Scanlon
1440 Deposit Guaranty Plaza
Jackson, Mississippi 39201

Counsel for Petitioners